No. 3712

In the United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF THE PETITION OF HOSAYE SAKAGUCHI, FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

In view of the fact that the statement of the case as set forth in the brief of appellant merely contains a history of the proceedings and none of the facts, we will set forth a brief summary of the case.

On the 23rd day of December, 1919, the appellant, Hosaye Sakaguchi, arrived at the port of Seattle

from Japan, and on the 26th day of December, 1919, she was given a hearing before a special board of inquiry, which board voted to exclude her on the ground that she was affected with hookworm and therefore likely to become a public charge. At the request of appellant she was permitted to take hospital treatment, and on the 24th day of January, 1920, she was certified as cured of the disease. Because of certain developments in the case, it was considered prudent to continue the case for another inquiry and on the 26th day of January, 1920, a further hearing was had before a special board of inquiry, the members of said board consisting of two immigrant inspectors and a clerk appointed to serve on said board in accordance with Section 17, Act of February 5, 1917. The said board unanimously decided that the appellant be refused a landing, on the ground that she was likely to become a public charge. Thereafter, at the request of appellant, the case was re-opened, and further testimony on behalf of the appellant presented on the 27th day of February, 1920, before a special board of inquiry constituted of two immigrant inspectors and a clerk authorized under Section 17 of the Act of February 5, 1917, which said special board again refused a landing, (not unanimous).

Appeal was taken to the Secretary of Labor, and the finding of the board was affirmed.

Petition for a writ of habeas corpus was filed (Tr. p. 3) setting forth that the petitioner was refused a fair and impartial trial, enumerating four subdivisions thereof, and in a memorandum decision (Tr. p. 9), the petition was dismissed.

The facts in the case are, briefly: Appellant is about twenty-four years of age, has been married twice "by proxy," and a subject of Japan. About four or five years ago appellant came to Victoria, B. C., as "proxy" wife of a Japanese, and lived with him as his wife in Victoria for about six months. According to her story they could not live together harmoniously and she therefore left him. Appellant's sister and brother-in-law, Horikawa, who conducts a hardware store in Seattle, assisted her to return to Japan. Appellant was again married "by proxy" to one Sakaguchi in February, 1919, Mr. Horikawa arranging the marriage and advancing the money to bring appellant to the United States to said Sakaguchi, who was employed by said Horikawa. Upon arrival at this port appellant was found to be afflicted with hookworm and was given hospital treatment. While she was in the hospital, trouble arose between said Sakaguchi, husband of

appellant, and Horikawa, brother-in-law of appellant, as a result of which the husband refused to accept his wife when she was pronounced cured, and requested that she be deported to Japan, stating that one of his reasons for this action was that appellant had been married before and had been in trouble, which facts he had ascertained after her arrival at Seattle.

There is some evidence to show that the sister and brother-in-law of appellant are desirous of caring for her. There is also some evidence that appellant is able to earn her own livelihood and has done so since her release on bond. The record in the case also discloses that at the time of the hearing of January 26, 1920, and February 27, 1920, the husband had no means and was unemployed at the time. The record also discloses that the appellant has a brother in Japan.

There are five assignments of error (Tr. p. 13). Two questions are presented for the court's consideration: The first—Was the board of special inquiry legally constituted—is covered by Assignment No. I. The second—Did the petitioner have a fair hearing—is covered by Assignments of Error Numbers II and V. Assignments of Error Numbers III and IV will not be discussed, since they necessarily

follow the holding of the court on the questions above stated.

The first question was raised for the first time, informally, during the course of argument before the District Court. Nowhere in the record attached to the return to the petition for habeas corpus is there any reference to this question made, nor does the petition (Tr. p. 2) raise the question. At the time the question was raised, the appellee stated to the court that Wilbur F. Patterson, a member of the board of special inquiry, had been appointed to serve on said board in accordance with Section 17 of the Act of February 5, 1917, and at that time offered to attach said authorization and oath of office of the said Wilbur F. Patterson to the return. At that time counsel for appellant conceded that said Patterson had been appointed and consented that the matter be submitted to the court without the record of said appointment being attached to the return. It was, however, argued at that time that said appointment was not warranted by said Section 17, Act of February 5, 1917. Judge Cushman in his memorandum decision (Tr. p. 9), on the conceded statement of fact and on the argument said, "I conclude that the board of special injuiry was legally constituted."

ARGUMENT

I.

WAS THE BOARD OF SPECIAL INQUIRY LEGALLY CONSTITUTED?

The board of special inquiry consisted of two immigrant inspectors, F. S. McCullough and Benjamin A. Hunter, and of a stenographer and member, Wilbur F. Patterson. Section 17 of the Act of February 5, 1917, provides for the appointment of boards of special inquiry. Attention is called to the wording of said Act:

> "That Boards of Special Inquiry * * * When in the opinion of the Secretary of Labor * * *, the Secretary of Labor shall authorize the creation of boards of Special Inquiry by the Immigration officials in charge at such ports, and shall determine what Government officials *or other persons* shall be eligible for service on such boards." * * * Such board shall keep a complete permanent record of their proceedings and of all testimony as may be produced before them, and the decision of any two members shall prevail."

Thus far, no court has passed on the question raised here. The case of *U. S. vs. Redfern*, 180 Fed. 500, while it is not strictly in point, was a consideration of Section 25, Act of February 20, 1907, 34 Stat.

906, and that act clearly provided for boards to be composed of immigrant officials or other government officials. Section 17 of the Act of February 5, 1917, is clear and unambiguous. It was no doubt the intendment of Congress that others than officials, if selected and approved in accordance with said Section 17, should be eligible to serve on boards of special inquiry. It has been found practical, since Section 17 of the Act of February 5, 1917, requires the presence of a stenographer at the hearing, to have the stenographer or clerk also a member of the board. The old Act of February 20, 1907, having been found insufficient in many respects, the Act of February 5, 1917, was passed to facilitate the enforcement of the immigration laws; and the insertion of the words "*or other persons*" was with a purpose.

Counsel contends at length that a clerk or stenographer is not an official. That, for the purpose of this argument, is conceded. The statute clearly contemplates the appointment of others than officials to serve on boards of special inquiry.

II.

DID APPELLANT HAVE A FAIR AND IMPARTIAL HEARING?

The inquiry of the court should be, *not*: Would this court or some other court come to a different conclusion than that of the board of special inquiry, *but*: Was there *any* evidence on which to base the conclusion?

> "Where there is any evidence on which to base a warrant of deportation, the courts will not review it on habeas corpus."
>
> *U. S. v. ex rel Diamond v. Uhl*, 266 Fed. 34.

> "It is not our province to weigh the testimony. We can go no further than to determine whether or not the officials to whom are entrusted the enforcement of the law have * * * abused the discretion which was * * *placed in them."
>
> *Lim Chan vs. White*, 262 Fed. 762.

To the same effect are also:

Whitfield vs. Hanges, 222 Fed. 745;
Katz vs. Commissioner of Immigration, 245 Fed. 316;
Jeung Back Hong et al. vs. White, 258 Fed. 23;
U. S. vs. Wong Lai, 270 Fed. 57.
White vs. Chan Wy Sheung, 207 Fed. 764;
Low Wah Seuy vs. Backus, 225 U. S. 46, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Guiney vs. Bonham (9 C. C. A.), 261 Fed. 582, at 586.

In considering testimony, the immigration board (not necessarily being constituted of lawyers) are not held to a strict adherence to the rules of evidence required in a law court. In the case of *Guiney vs. Bonham* (9 C. C. A.) 261 Fed. 582, at 586, the court held that hearsay was admissible for a board of inquiry.

It is also evident from the record that the board took cognizance of the so-called "Gentlemen's Agreement" which prohibits the issuing of passports to one of the laboring class, and which further provides only for the issuance of passports to children to a domiciled parent, parent to domiciled child, and wife to a domiciled husband (no provision being made for the issuance of a passport to a sister to go to a sister or brother). The Circuit Court for the Ninth Circuit, in the case of *Akira Ona vs. U. S.*, 267 Fed. 359, took judicial notice of what is known as the "Gentlemen's Agreement."

The finding of the special board of inquiry on January 26, 1920, set forth in appellant's brief at page 27, the statement of member Patterson, and the conclusion of the board on February 27, 1920,

cited at page 35 of appellant's brief, clearly present the facts of this case.

The board could not consider the admission of appellant independent of her husband, even though she were able to earn her own livelihood by sewing and house-work, for to do so would be to admit a laborer, which is inherently contrary to the existing immigration statutes and treaties, nor can the sister and brother-in-law be legally held for her support.

We respectfully submit that the judgment and order of the trial court should be affirmed.

Respectfully submitted,

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